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IN THE

Supreme Court of the United States

October Term, 1955.
No. 309

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Reply of Petitioner William Schneiderman to Brief for the United States.

A. Respondent's reply emphasizes the substantial importance of the questions presented. The issues existing here are far different from those which arose in *Dennis,* or in *Frankfeld* and *Flynn* where certiorari was denied. In this case, the courts below, and respondent, propose a new and sharp enlargement of the scope of the Smith Act which seriously intrudes into First Amendment rights. Only review by this Court can prevent the enforcement of the Act from becoming "unconfined and vagrant."

Cardozo, J., in *Schechter v. United States*, 295 U. S. 495, 551.

Thus, in the proceeding here, one of the crucial points is the refusal of the trial judge, sustained by the Court of Appeals, to give any instruction to the effect that the advocacy and teaching prohibited by the Smith Act must be in language of incitement to action. This is the first case presented to this Court where there was a refusal to give such instruction.

In this case, the trial judge refused to make any finding with respect to "clear and present" danger, holding only that seditious intent and clear and present danger were the same. This is the first case presented to this Court where a trial court has refused to make a proper finding of clear and present danger, and where it is contended that such finding can be made by an appellate court based only on the state of international relations to the exclusion of an accused's power to bring about the evil or the nature of his activities.

This is the first case where the sufficiency of the evidence to establish the "overt acts" as charged in the indictment, and the failure to properly instruct with respect thereto, is presented. No other case before this Court in a Smith Act prosecution has presented the question of the application of the "overt acts" provision of the conspiracy statute to the Smith Act under the Constitution.

This is the first case where the proper interpretation of the word "organize" in the Smith Act is presented for this Court's determination. In *Dennis*, the indictment

was returned only a few days before the expiration of the three-year statute of limitations. In *Frankfeld*, the issue was not raised. In *Flynn*, the ruling of District Judge Dimock was precisely contrary to the ruling of the courts below.

The evidence here was different from that in *Dennis* or any other Smith Act prosecution. The record is barren of evidence to establish connection with the conspiracy charged in the indictment or individual specific intent. Whether proof of membership and officership in the Party and lawful activities therein are sufficient to permit the case to go to the jury has never been presented as pointedly as in the case herein.

B. On the issue of *res judicata* and collateral estoppel, respondent's brief (pp. 51-52) makes no attempt to dispute petitioner's statement of the similarities of the issues and the evidence in *Schneiderman* and the case herein (Pet. pp. 4-14, 29-34). Respondent cites only one precedent (and that one is opposed to its position) and makes no attempt to discuss any of the clear precedents which support petitioner's position (Pet. pp. 27-29, 34-39). Petitioner would add the recent decision of this Court in *Partmar Corporation v. Paramount Pictures Theatres Corporation*, 349 U. S. 89. Moreover, respondent has not discussed the prejudice flowing from the trial court's refusal to give any instruction to the jury with respect to the issue here as raised by petitioner during the trial (Pet. pp. 38-39). Respondent's own statement of the facts with respect to petitioner (Resp. Br.

pp. 5-6), and its discussion of the same "principles of Marxism-Leninism" distilled from the same or similar books as in *Schneiderman,* emphasize that the evidence and issues of petitioner's knowledge and intent from 1922 on were the same in *Schneiderman* as in the case herein. Respondent makes no argument that the "additional evidence" (Pet. pp. 14-27, 37-38) deprived petitioner of the right to invoke the principles of collateral estoppel.

There is plainly presented here a substantial question affecting the administration of criminal justice in the federal courts which ought to be reviewed by this Court.

Conclusion.

The petition for writ of certiorari should be granted.

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